



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Osumba v Kenya National Assurance Limited & 4 others (Civil Case 188 of 2011) [2024] KEHC 16236 (KLR) (17 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16236 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL CASE 188 OF 2011  
HI ONG'UDI, J  
DECEMBER 17, 2024**

**BETWEEN**

**FREDRICK HEZRON AWUOR OSUMBA ..... PLAINTIFF**

**AND**

**KENYA NATIONAL ASSURANCE LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**GARAM INVESTMENTS ..... 2<sup>ND</sup> DEFENDANT**

**MACAO PROPERTIES ..... 3<sup>RD</sup> DEFENDANT**

**GEOFFREY NGUGI ALIAS GEOFFREY NYAMBURA ..... 4<sup>TH</sup> DEFENDANT**

**NAKURU DISTRICT LAND REGISTRAR ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. In the Notice of motion dated 5<sup>th</sup> October 2021 the plaintiff prays for the following orders;
  - i. That, the time within to fix a hearing date for this suit be extended.
  - ii. That, the costs of this application be in the cause.
2. The application is premised on the grounds on it's face as well as the affidavit of the plaintiff/applicant's advocate sworn on even date. He deponed that in the court's ruling delivered on 29<sup>th</sup> July 2021, the plaintiff was ordered to fix the suit for hearing within 30 days. Further, that in compliance he wrote a letter dated 26<sup>th</sup> August, 2021 to the Deputy Registrar requesting to have the matter fixed for hearing.
3. He further deponed that during the mention on 21<sup>st</sup> September 2021, the respondents' counsel misled the court that the plaintiff/applicant had failed to comply with the court's ruling. That the deputy registrar subsequently directed that the file be returned to the registry for parties to fix a hearing date. He added that the plaintiff/ applicant is still very much interested in pursuing this matter and the same should not be dismissed on technicality reasons.



4. The 1<sup>st</sup> and 2<sup>nd</sup> defendant/respondents in response filed a replying affidavit sworn on 16<sup>th</sup> February 2024 by the 1<sup>st</sup> defendant/respondent's company secretary. She averred that the plaintiff/applicant's application was an abuse of the court process deliberately aimed at misleading the court and that the court's discretion should not be exercised in his favour. Further, that he filed this suit on 22<sup>nd</sup> July 2011, seeking a permanent injunction, restraining the defendants /respondents from alienating the suit property.
5. She further averred that this case has been in court for the last 13 years and the plaintiff/applicant has never been keen on prosecuting it. She added that the plaintiff/applicant had been filing applications with similar prayers, none of which has been prosecuted to finality.
6. The 3<sup>rd</sup> respondent filed grounds of opposition dated 17<sup>th</sup> July 2024. It stated that the application herein lacked merit and was a deliberate attempt by the plaintiff/applicant to delay justice. Further, that the same was waste of judicial time as the suit had already been dismissed for want of prosecution. In addition, that the application was filed out of the specified time given by the court and without leave of the court which was a clear contempt of the court orders issued on 29<sup>th</sup> July 2021.
7. The application was canvassed by way of written submissions.

#### **Plaintiff/Applicant's submissions**

8. These are dated 27<sup>th</sup> October, 2024. The plaintiff/applicant gave a brief background of the case and identified two issues for determination.
9. The first issue is whether the plaintiff/applicant has met the criteria set for grant of order of extension of time within which to fix a hearing date for the main suit. He submitted in the affirmative and urged the court to be guided by the decision in Mombasa Court Civil Application No. E059 of 2024.
10. On the issue of costs, he argued that the same be in the cause. In conclusion, he cited Article 159 of [\*the Constitution\*](#) and section 95 of the [\*Civil Procedure Act\*](#) and urged the court to allow his application.

#### **3<sup>rd</sup> Respondent's submissions**

11. These were filed by Gachie Mwanza & Company Advocates and are dated 16<sup>th</sup> October, 2024. Counsel gave brief facts of the case and identified two issues for determination.
12. The first issue being whether the plaintiff /applicant meets the criteria set out for extension of time. Counsel submitted that an application for extension of time ought to show good and substantial reasons for the delay and prima facie good cause why it should be heard. That whilst the first leg required a satisfactory justification, the second leg only required one to show that the grounds are arguable. Further, that it is upon satisfaction of both the above that the court would exercise its discretion to grant the application.
13. He further submitted that discretionary power ought to be confined to the rules of reason and justice. He placed reliance on the Supreme Court decision in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR which set out the considerations to guide the court in exercising its discretion in cases of this nature.
14. The second issue is whether the defendant/respondent shall suffer any prejudice should the extension be granted. Counsel submitted that further extension and delay of this matter for any reason whatsoever clearly prejudiced the 3<sup>rd</sup> defendant/respondent as it is constantly getting dragged back and



forth over a suit property that was no longer in its possession or ownership. He urged the court to dismiss the application with costs to 3<sup>rd</sup> defendant/respondent.

### **Analysis and determination**

15. I have carefully considered the application, affidavits, grounds of opposition and submissions by the parties. I find the issue arising for determination to be whether the application herein is merited.
16. It is not disputed that indeed on 8<sup>th</sup> February 2017 this court dismissed the plaintiff/applicant's case for want of prosecution. Further, by an application dated 2<sup>nd</sup> December 2020, the plaintiff/applicant sought that the orders issued on 8<sup>th</sup> February 2017 dismissing his case be set aside. A ruling in respect to that application was delivered on 29<sup>th</sup> July 2021 as follows;
  - i. The orders of this court dated 8<sup>th</sup> February 2017 together with all consequential orders be and are hereby set aside.
  - ii. The suit should be set down for hearing within the next 30 days from the date herein and in default the above orders are reinstated automatically.
  - iii. The first and second respondents shall have thrown away costs of Kshs. 20,000 payable by the applicant before the hearing date.
17. This court notes that this is an old matter having been filed on 22<sup>nd</sup> July 2011. The court in dismissing the suit noted that no step had been taken by the plaintiff/applicant since 4<sup>th</sup> December 2015. Thereafter, that is 3 years later the plaintiff/applicant made an application for setting aside the orders for dismissal of his suit for want of prosecution and the same was granted. The court however in its ruling, gave conditions which are clearly set out at paragraph 16 above.
18. The plaintiff/applicant does not dispute that the said orders were not complied with hence his present application seeking extension of time within which to fix a hearing date. The reason he has given in not prosecuting his matter is that his former advocates did not appear in court when the matter was fixed for mention by the deputy registrar and that he was also not aware of the said date.
19. The Court of Appeal in the case of A.B. & Another v R.B., Civil Application No. 4 of 2016 [2016] eKLR cited with approval the Constitutional Court of South Africa's decision in Burchell v. Burchell, Case No.364 of 2005 where it was held:

“Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. *The Constitution* states that the rule of law and supremacy of *the Constitution* are foundational values of our society. It vests the judicial authority of the state in the court and requires other organs of the state to assist and protect the court. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively have the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.”
20. Having looked at the orders issued by this court on 29<sup>th</sup> July 2021, I note that the same were clear and meant that in the event the same was not complied with the 8<sup>th</sup> February 2017 orders would be reinstated automatically. The reason adduced by the plaintiff/applicant for none compliance of the court orders on fixing the hearing do not hold water.
21. The orders dismissing the suit were reinstated on 29<sup>th</sup> August, 2021. The present application though dated 5<sup>th</sup> October, 2021 was only filed on 13<sup>th</sup> October, 2021 i.e six (6) weeks after reinstatement of the



dismissal orders. No good reason has been placed before this court to make it interfere with the orders of 29<sup>th</sup> July, 2021. In view of what I have stated above and what has transpired herein I find that this court is functus officio and thus estopped from issuing any other orders to the contrary.

22. The upshot is that the application dated 5<sup>th</sup> October, 2021 lacks merit and is hereby dismissed with costs to the defendants.
23. Orders accordingly.

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 17<sup>TH</sup> DAY OF DECEMBER, 2024 IN OPEN COURT AT NAKURU.**

**H. I. ONG'UDI**

**JUDGE**

